that the principles applicable are as restated by Lord Denning in *Dietz* v. *Lenning Chemicals Ltd.*,[3] but, with the utmost respect, I do not think that the consent in any way appeared to have been "given under a misapprehension or from a misstatement or want of materials". On this point, going a step further, I would quote Fry L.J. in *Matthews* v. *Munster* [4]:—

"In the compromise itself there is nothing that is outside the case, nothing which is unjust, or which shocks the conscience of the court, and nothing in the nature of a slip."

The terms of the bargain were not only fair, but indeed, of practical advantage to the appellant — if he has the sense to see it — because he ought to realise that, were the action to take its normal course, with accounts and inquiries etc., it is most unlikely that he will see the colour of the money he had invested, or even a portion of it, before 1970, while the costs of the action keep mounting in the meantime.

I would allow this appeal, set aside the order appealed against and affirm the consent order made on June 1, 1966. Costs of the motion and of this appeal to the appellant; the deposit in court to be refunded to the appellant.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal allowed.

Solicitors: *Morris Edgar & Co.; Heng, Chen & Co.*

ALI BIN HASSAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) April 12, 1967]

[J.B. — Criminal Appeal No. 8 of 1966]

Road Traffic — Using car as public service vehicle without valid licence — Using car without there being in force a policy of insurance in respect of 3rd party risks — Road Traffic Ordinance, 1958, ss. 74(1) & 92(1).

Evidence — Police observation over motor vehicles suspected of being used contrary to section 92(1) of Road Traffic Ordinance, 1958 — Admissibility — Evidence Ordinance, 1950, s. 15 — Road Traffic Ordinance, 1958, s. 144.

Criminal Law and Procedure — Charge — Trial — Separate.

The appellant was convicted on charges alleging: (1) he had used motor car SK 8626 as a public service vehicle without a valid licence contrary to the provisions of section 92(1) of the Road Traffic Ordinance, and (2) he used the said car without there being in force a policy of insurance in respect of third party risks, an offence under section 74(1) of the same Ordinance. He was fined and disqualified from holding or obtaining a licence for a period of 12 months and the car was confiscated. At the trial the prosecution led evidence to establish that on not less than 30 occasions from December 14 to 18, 1965 the appellant was observed by police to have been using the same car for the conveyance of passengers of different racial origins. On December 19 he was stopped by the police at a road block and in the car beside him were three other passengers. The allegation in the first charge was concerned only with what occurred on December 19.

Held: (1) the repeated acts of conveying passengers on various occasions prior to the date material to the charge was irrelevant and inadmissible. *Abdul Hamid v. Public Prosecutor* [1] and *Darus* v. *Public Prosecutor* [2] not followed;

(2) on the facts, in this case there was sufficient foundation for invoking the appropriate presumption under section 144 of the Road Traffic Ordinance;

(3) in cases where the evidence available renders it unnecessary to rely on the presumption there can be no objection to having both charges tried together at the same trial. In such an event the conviction for an offence under section 92(1) of the Road Traffic Ordinance would automatically lead to the conviction on a charge under section 74(1). Where it became necessary because of insufficient evidence to rely on the presumption it would be improper to have the charge under section 74(1) tried at the same trial.

Observations on requirement for a separate charge and a separate trial.

Cases referred to:—

(1) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44.

(2) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

(3) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

(4) *Harris* v. *Director of Public Prosecutions* [1952] A.C. 695.

CRIMINAL APPEAL.

C. N. Mendis for the appellant.

Tunku Zaid bin Tunku Zakaria (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal against conviction and sentence imposed by the magistrate at Pontian for offences under the Road Traffic Ordinance No. 49 of 1958. Three charges were originally preferred against the appellant but one of these, the 2nd charge, was withdrawn. The 1st charge alleged that the appellant had used motor car SK 8626 as a public service vehicle without a valid licence contrary to the provisions of section 92(1) of the Ordinance, and in the 3rd charge the allegation was that he used the said car without there being in force a policy of insurance in respect of third party risks, an offence under section 74(1) of the same Ordinance. He was convicted on both charges and was sentenced to a fine of $300 on each charge and in addition there was an order disqualifying him from holding or obtaining a licence for a period of 12 months. The car was also ordered to be forfeited.

At the trial the prosecution led evidence to establish that on not less than 30 occasions from the 14th to the 18th of December, 1965, the appellant was observed by the police to have been using the same car for the conveyance of passengers of different racial origins. On the 19th he was stopped by the police at a road block and in the car beside him were 3 other passengers — a Malay woman, a Chinese woman and a Chinese man. The allegation in the 1st charge was, however, concerned only with what occurred

on the 19th December. One of the grounds of complaint in this appeal is that the evidence as to what happened prior to the 19th was irrelevent and prejudicial and should not have been admitted. As different views had been expressed elsewhere on the admissibility of such evidence I shall pause here to consider this ground of complaint. The practice of keeping observation over motor vehicles suspected of being used contrary to section 92(1) of the Road Traffic Ordinance appears to have been adopted by the police from as far back as 1961. Adams J. in *Abdul Hamid* v. *Public Prosecutor* [1] approved this practice saying at page 45:—

"In *Gun Kim Luu's* case the police had kept watch on the vehicle over a period of time and had gathered evidence which was admissible under section 15 of the Evidence Ordinance which showed quite conclusively that the defendant had been plying for hire and I think it very desirable that evidence of this nature should be produced in all cases of this nature. Such evidence is always available since the police, I am quite certain, would never stop a private vehicle at random merely because it had more than one person in it and in my opinion evidence of previous instances should be given."

The practice was also approved by Ong J. in *Darus* v. *Public Prosecutor* [2] when he said at page 148:—

"What took place during the previous 14 days was evidence, for the purpose of section 15 of the Evidence Ordinance, to prove that the meetings were not accidental and that it was the appellant's regular practice to pick up passengers."

Earlier on at page 147 his Lordship had said:—

"Furthermore, the carriage of 140 passengers during the preceding 14 days could by no stretch of imagination be ascribed to accidental meetings and compliance with requests by friends and relatives of the appellant for gratuitous transport, for which he was out of pocket to the extent of 1½ gallons of petrol daily, costing about $3."

But in Perak Criminal Appeal No. 152 of 1963 I had occasion to observe as follows:—

"As far as I can advise myself, the evidence given in respect of the transactions recorded by the police constables except the one which occurred on the 19th August, 1962, should not have been admitted as those transactions were not relevant in law to the charge before the magistrate. The appellant, however, has not appealed on this ground, and I do not wish to say anything more except to observe that such evidence cannot be admitted under seection 15 of the Evidence Ordinance because the question whether a particular act is accidental or intentional is not an essential ingredient of an offence under section 92 of the Road Traffic Ordinance."

Now that the question has again been raised I think it is necessary to state more fully my reasons for coming to a different view.

This evidence of police observations of the conveyance of passengers prior to the date material to the charge had been relied upon by the prosecution obviously for the purpose of showing that the appellant was likely to have committed the offence with which he was charged. Before considering the admissibility of such evidence I can only say that even if it were admissible it could only have the effect of raising a suspicion that by reason of the frequent recurrences of those acts of conveying passengers the appellant was using the car illegally or contrary to the provisions of section 92(1) of the Road Traffic Ordinance. The truth of the matter, however, is that such evidence necessarily falls within that class of evidence which, according to the principle formulated by Lord Herschell in *Makin* v. *Attorney-General of New South Wales,* [3] should be excluded. At page 65 Lord Herschell said:—

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character, to have committed the offence for which he is being tried."

This principle was considered and approved in *Harris* v. *Director of Public Prosecutions.* [4] At page 705 Viscount Simon said:—

"In my opinion, the principle laid down by Lord Herschell L.C. in *Makin's* case remains the proper principle to apply, and I see no reason for modifying it."

So much for the principle which governs the admissibility of this class of evidence.

It has, however, been stated that such evidence could be admitted under section 15 of the Evidence Ordinance. This section provides as follows:—

"When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

The principle contained in this section applies equally in England and it was stated by Lord Herschell in *Makin's* case at page 65 in these terms:—

"On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused."

It now becomes necessary to enquire whether in a prosecution for an offence under section 92(1) of the Road Traffic Ordinance there can possibly arise the question whether the act alleged to constitute the offence was accidental or intentional or done with a particular knowledge or intention. What is prohibited in the section is the act of conveying passengers in the car for hire or reward without a valid licence. The simple issues raised in a charge for such an offence are (1) whether or not on the material date the conveyance of passengers was for hire or reward and (2) if it was, whether such conveyance was authorised by a valid licence. The first of these issues turns solely on the question whether fares have or have not been paid to or received by the

person charged. It is a straightforward question of fact to be determined by the evidence of the passenger or passengers conveyed in the car or of other witness or witnesses, if any. Where such evidence is not forthcoming the prosecution is, of course, entitled to invoke the appropriate presumptions in section 144 of the Road Traffic Ordinance. But the evidence of the occurrences of a series of similar transactions of the nature disclosed in this case could hardly lead to the conclusion that fares had been paid to or received by the person charged. The repeated acts of conveying passengers on the various occasions prior to the date material to the charge are as colourless as the act which was alleged in the charge. That this is recognised by the Legislature is reflected by the need of enacting the necessary presumptions in section 144. In this context it is difficult to conceive how the element of accident or intention could have any material bearing on the issue. Accordingly it must therefore be ruled that the evidence of the police observation in this case was irrelevant and inadmissible. It remains only for consideration whether the wrongful admission of such evidence would justify interference with the magistrate's decision on the 1st charge. It appears clear from the evidence on the record that 3 passengers were being conveyed in the car on the 19th December and this was sufficient foundation for invoking the appropriate presumption under section 144 of the Road Traffic Ordinance. The trial magistrate was right, therefore, in calling for the defence. The evidence in rebuttal, however, was a bare denial that the conveyance of passengers was for hire and reward and this, as he was entitled to do, was rightly rejected by the trial magistrate. The appeal against conviction on the 1st charge must therefore be dismissed. The order of forfeiture must likewise be upheld.

The appeal against conviction on the 3rd charge, which I shall hereinafter describe as the insurance charge, was largely concerned with the question whether the conviction on the 1st charge would automatically lead to the conviction on the insurance charge which is for an offence under section 74(1) of the Road Traffic Ordinance and which falls under Part IV of the Ordinance. The substance of the allegation in this charge was that the car insured as a private car had been used for the purpose which formed the subject matter of the 1st charge. It must again be stated here that but for the relevant presumption in section 144 of the Road Traffic Ordinance the evidence available to the prosecution at the trial would not have been sufficient to establish the fact that fares have been paid to or received by the appellant. Inasmuch as this same evidence was relied upon by the prosecution to support the allegation in the insurance charge the appellant would have been acquitted if the charge had been tried separately for then any of the presumptions in section 144 would not have been available to the prosecution. It has become a common practice in the courts of this country to add the insurance charge in a prosecution for an offence under section 92(1) of the Road Traffic Ordinance. But insufficient consideration has been given to the fact that section 144 while providing an alternative mode of proof for an offence under section 92(1) is not applicable to a prosecution for an offence which does not fall within Part V of the Ordinance. In cases where the evidence available renders it unnecessary to rely on the presumption there can be no objection to having both the charges tried together at the same trial. This is permitted by section 165(i) of the Criminal Procedure Code. In such an event the conviction for an offence under section 92(1) would automatically lead to the conviction on the insurance charge. This must necessarily be so because the same evidence is sufficient to support the allegations in both the charges. But in cases where it becomes necessary because of insufficient evidence to rely on the presumption it would be improper to have the insurance charge tried at the same trial. I say "improper" because the joinder of the charges would be contrary to the principle contained in section 163 of the Criminal Procedure Code. This section was enacted to ensure that an accused person is given a fair trial. The requirement for a separate charge and a separate trial is clearly to ensure that an accused person understands not only the allegation made against him but also the nature of the evidence supporting the allegation. In the instant case the appellant, who was not defended at the trial, was placed in the unhappy position of having to rebut the presumption of law on one hand and a presumption of facts on the other. In such a situation he could not have understood the nature of the evidence that would go in support of the 1st charge and the nature of the evidence that would go in support of the insurance charge. The trial magistrate was clearly unaware of the predicament in which the appellant was placed, and being so unaware had probably assumed that the conviction on the 1st charge must necessarily lead to the conviction on the insurance charge. All this could have been avoided if each of the charges had been tried separately. In the final analysis I feel compelled to conclude that there was insufficient evidence to support the conviction on the 3rd charge. In this connection I feel bound to refer once again to the judgment of Ong J. in *Darus* v. *Public Prosecutor, supra,* where his Lordship said at page 148 as follows:—

> "Conviction on the first charge, on the evidence produced in this case, makes conviction on the other two charges inevitable, and I accordingly dismiss this appeal, and confirm the judgment sentence and order of the magistrate."

I can only assume that in saying that the convictions on the other two charges were inevitable

his Lordship was satisfied that the same evidence that went in support of the 1st charge was, without the aid of the presumption, sufficient to support the other two charges. Accordingly I would allow the appeal against conviction on the 3rd charge and order that it be retried before a different magistrate. The sentence and other orders imposed following this conviction must, therefore, be set aside and the fines, if paid, to be refunded to the appellant.

Appeal against 1st charge dismissed; Appeal against 3rd charge allowed; Retrial ordered.

Solicitor: *Lal Behari Singh.*

PUBLIC PROSECUTOR v. LATCHEMY

[A.Cr.J. (Pawan Ahmad J.) April 15, 1967]

[Seremban — Criminal Appeal Nos. 3 & 9 of 1967]

Criminal Law and Procedure — Bail — Accused woman charged with murder — Exceptional and very special reasons — Criminal Procedure Code (Cap. 6), s. 388(v).

Penal Code s. 302 — Murder — Accused a woman Application for bail.

The exception in section 388(v) of the Criminal Procedure Code (Cap. 6) to grant bail to a woman accused is a discretion which should be exercised sparingly and judiciously depending on the reasons of each particular case.

In this case the respondent was charged with the offence of murder. Upon her application for bail on the ground that she was "a mother of 10 children and the youngest of them is still under breast feed" the learned magistrate granted her application subject to a bail of $2,000 in two sureties.

Held: the reasons put forward in this application fell far short of being exceptional and very special reasons and the application should have been refused.

Case referred to:—

(1) *R.* v. *Ooi Ah Kow* [1952] M.L.J. 95.

CRIMINAL APPEAL.

Abu Talib bin Othman (Deputy Public Prosecutor) for the appellant.

Gurdial Bakan Singh for the respondent.

Pawan Ahmad J.: The respondent in both these cases was a woman charged with the offence of murder punishable under section 302 of the Penal Code and the only punishment for such an offence is death.

When her case came up for mention in the magistrate's court on 28th December, 1966 before the learned president who was sitting as a magistrate, an application for bail was made on her behalf by her counsel and her application was granted subject to a bail of $2,000 in two sureties.

The learned deputy public prosecutor filed an appeal against the said order.

On 3rd February, 1967 when this case came up for mention before another magistrate, an application was made by the learned deputy public prosecutor under section 388 (v) of the Criminal Procedure Code (Cap. 6) to remand the accused in custody. The learned magistrate held the view that he had no power to over-rule the decision of the learned president and therefore decided that the case should be further argued before the president and in the meantime, he extended the bail.

The learned deputy public prosecutor also appealed against the order of this magistrate.

As both these appeals are on the same subject matter, it is convenient to deal with them together. The general rule under section 388(v) of the Criminal Procedure Code is that the court should not grant bail to a person charged with an offence punishable with death. One of the exceptions to this rule is that the court may grant bail to a woman accused. In my view this exception is a discretion which should be exercised sparingly and judiciously depending on the reasons of each particular case. Spenser Wilkinson J. in the case of *R.* v. *Ooi Ah Kow* [1] at page 97 states as follows:—

"Again, following the case of *Re K. S. Menon*, I was of the opinion that in cases punishable with death and in cases punishable with penal servitude for life the High Court ought not to grant bail, except for exceptional and very special reasons."

The criterion by which a magistrate should allow bail in cases of this type, in my view, is only in those cases where he is convinced that the reasons put forward by the applicant are said to be exceptional and very special reasons.

In the present case the only grounds on which this application for bail was granted by the magistrate's court appear to be as follows:—

"The accused is a mother of ten children and youngest of them is still under breast feed."

In my opinion the reasons put forward in this application fall far short of being exceptional and very special reasons and, therefore, the application should have been refused by the magistrate's court.

In the above circumstances, I allow both the appeals by the learned deputy public prosecutor. Bail cancelled, and respondent to be put back on remand.

Appeals allowed. Bail cancelled.